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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 344

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

versus

STATE OF FLORIDA, ETC., ET AL.,

Appellees.

No. 345

STATE OF FLORIDA, ETC., ET AL.,

Cross-Appellants,

versus

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.,

Cross-Appellees.

ADDITIONAL BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY.

This additional brief is filed in pursuance of permission granted by this Court on January 18, 1935, and is in addition to the positions taken on the kindred subject in the briefs heretofore filed in this cause.

Importance of the Question Involved.

The importance of the question here treated is not limited to the case at bar. The question really is:

Shall Section 13 (4) of the Act to Regulate Commerce be construed as though it were enacted to strengthen the Act; or is it to be construed and applied as though it were an independent enactment?

To construe § 13 (4) as though it were enacted for the purpose of strengthening the Act will be in harmony with the *Abilene Cotton Oil* case, 204 U. S. 426, and the great mass of cases which have flowed from it.

To construe it as though it were an independent enactment will greatly impair the harmony and uniformity of the Act.

The Primary Jurisdiction in This Restitution Proceeding Should Have Been with the Interstate Commerce Commission.

This point was amply made before the District Court. (See R., Vol. 1, pp. 41, 58, 60, 65, and 365.)

§ 13 (4) of the Act to Regulate Commerce (which is quoted at page 111 of appellant's brief dated January 7, 1935) empowers the Interstate Commerce Commission whenever it is found after a full hearing, that any rate, etc., mentioned in subsection 3 of Section 13 of the Act, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, to prescribe the rate, fare, or charge thereafter to be charged, in such manner as in its judgment will remove

such advantage, preference, prejudice, or discrimination, and

> "Such rates, fares, charges, classifications, regulations and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

In *Florida* v. *United States*, 292 U. S. 1 (which is the case at bar in a previous hearing) the Court held:

> "The authority conferred upon the Commission by § 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body."

It is not in dispute that the schedule of rates promulgated by the Interstate Commerce Commission in the proceeding under § 13 (4) (146 I. C. C. 717; O. R., Vol. 1, p. 16-28) and which was evidenced by tariffs or schedules of rates filed in the manner required by the Interstate Commerce Commission were the law so long as the order of the Commission was unrevoked and that they should have been observed while in force and effect by the carrier and the shipper.

In this connection see *Louisville & Nashville Rd. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65, from which we quote as follows:

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Inter-

> state Commerce Commission. The amount of the freight charges *legally* payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefore. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577; *New York Central, etc., R. R. Co. v. York & Whitney Co.*, 250 U. S. 456. Compare *St. Louis Southwestern Ry. Co. v. Spring River Stone Co.*, 236 U. S. 518." (Italics added.)

It is true that the shipment there referred to was *inter state* rather than *intrastate*.

The text of § 13 (4) of the Act does not justify the thought that a tariff of intrastate rates ordered into effect by the Interstate Commerce Commission should not be followed during a period of litigation over the order which directed the rates to be put into effect although that order be subsequently overturned by the court. We do not understand appellees make any dispute as to this.

> "The duly filed and published tariff rate, while in force, is the only lawful rate." *C. R. & Q. Rd. Co. v. Merchants and Mallard Co.*, 291 Fed. 1 (C. C. A. 8).

The Provisions of § 13 (4) of the Act Which Came into It by Amendment Are to Be Construed as a Part of the Whole Act to Regulate Commerce.

§ 13 (4) came into the Act by amendment through the Transportation Act of 1920. It came as a part of an existing structure and is to have the same kind of construction as though it had been in the original Act. See *United States*

v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396, as follows:

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

Also *United States* v. *Barnes*, 222 U. S. 513, 520, from which we quote as follows:

> "Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as to the contrary clearly appears."

The same kind of conclusion is reached in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 384, from which we quote as follows:

> "As a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed."

Again the principle was stated where its application seems to be much further off than in the case at bar, in

United States v. *Sweet*, 245 U. S. 563, 572, as follows:

> "What has been said demonstrates that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will."

§13 (4) is, therefore, to be construed as intended to make "more perfect" the Act to Regulate Commerce; to give it more strength, not to detract from it. The acts of the carrier must be uniform when taken under this section just as they must be uniform when taken under other provisions of the Act. The other parts of the Interstate Commerce Act requiring uniformity of rates, charges, fares and practices apply to §13 (4).

The Master Purpose of the Act to Regulate Commerce Is Uniformity.

This has been stated in many instances by this Court. The master case is probably *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, decided in 1907. We quote from pages 439-440, as follows:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the es-

tablished schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479.

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

There has been no dissent from the doctrine there stated. Whenever this question has reached this Court, the opinion in the *Abilene* case has always been followed. Note the following cases:

Mitchell Coal and Coke Co. v. *Pennsylvania Rd. Co.*, 230 U. S. 247, at 255;

Robinson v. *B. & O. Rd. Co.*, 222 U. S. 506, 511;

Baltimore & Ohio Rd. Co. v. *United States, ex rel. Pitcairn Coal Company*, 215 U. S. 481, 494-5;

United States Navigation Co., Inc., v. *Cunard Steamship Co., Ltd.*, 284 U. S. 474, 482, 483;
Board v. *Great Northern Ruy. Co.*, 281 U. S. 412, 421-422;
Midland Valley Rd. Co. v. *Barkley*, 276 U. S. 482;
Northern Pacific Ry. Co. v. *Solum*, 247 U. S. 477, 483;
Keogh v. *Chicago & N. W. Ruy. Co.*, 260 U. S. 156.

The subject "The Doctrine of Primary Jurisdiction" is skillfully treated by Sharfman in his work on the Interstate Commerce Commission, Part II, p. 393.

The construction of the Act so as to require action by the Interstate Commerce Commission prior to the filing of suits on claims for overcharges and other like matters (frequently called reparations) originated out of the realization that this was necessary in order to preserve uniformity of treatment and to prevent unjust discrimination. The Court, in order to reach this construction, confined the operation of §§ 9 and 22 of the Act to the assertion at common law of only those causes which might be asserted consistent with the other provisions of the Act. See *Texas & Pacific Ruy.* case, *supra*, at pages 441, 442, 446-447.

§ 9 of the Act provides that any persons claiming to be damaged by any common carrier, subject to the provisions of the Act "may either make complaint to the Commission • • • or may bring suit in his or their own behalf for recovery of the damages for which the common carrier may be liable under the provisions of the Act."

§ 22 makes similar provisions.

The Court realized that the general terms of § 9, when taken alone, might sanction the conclusion that the shipper had a primary right to go into the courts to assert his claim for reparations growing out of interstate shipments. However it held that:

> "When the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible." (204 U. S. 442.)

The Circuit Court of Appeals for the Eighth Circuit in the case of *Chicago, B. & Q. R. Co.* v. *Merriam & Millard Co.*, 297 Fed. 1, at 5, holds that:

> "Since the decision in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 441, it has been the established rule that the maintenance of a suit in a court to recover damages from a carrier because of the collection of an unreasonable rate in violation of the Act to Regulate Commerce, depends on prior action by the Commission, as a foundation for it, whereby a right to reparation has been decided."

This rule seems to be without exception. Of course, such action may be brought without first going to the Commission when nothing is involved save the legal construction of the words of a tariff.

The Court, in recognition that the controlling purposes of the Act to Regulate Commerce are uniformity, the preventing of rebates and unjust discrimination had for more than twenty years before the enactment of the Transportation Act of 1920 consistently held that claims against carriers based on overcharges and other like causes arising in interstate commerce could not be acted upon by a court until it had been passed upon by the Commission.

That thought is a fundamental part of the law. A tariff filed with the Commission as required by law in pursuance of an order of the Commission removing unjust discrimination worked by intrastate State rates is the law and it is the law of the United States. Breaches of that law of the United States should be controlled by the method fixed by the Act to Regulate Commerce.

The District Court found that this case should be controlled by Florida law. The decision of the United States courts makes full recognition that these matters require solution by a body of experts. See *Great Northern Rwy.* v. *Merchants Elevator Company*, 259 U. S. 285, 291. That case arose out of a claim of discrimination against interstate commerce. The Court after noting that preliminary resort to the Commission is required in cases complaining that a rate is discriminatory as well in those involving the unreasonableness of a rate, said:

> "It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission."

Determination of claims arising under this action of the Interstate Commerce Commission must be governed by the thought that uniformity of treatment and removal of unjust discrimination against interstate commerce are to be measured by the same yardstick that applied to the transportation of interstate commerce. See *Board* v. *Great Northern Railway*, 281 U. S. 412, 420-424.

Board v. Great Northern Railway, 281 U. S. 412.

The opinion in the *Great Northern* case recognizes the primary jurisdiction of the Commission. At page 430, the opinion states:

> "Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforcement of its prohibition primarily to its administrative agency."

That necessarily means that the power of the Commission does not end with the making of findings of unjust discrimination against interstate commerce, and the issuing of

an order to remove it, but that this power continues so as to cover all matters which make the appropriate enforcement "of the order prohibiting such discrimination."

This opinion also states:

> "In this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

The Amendment of What Is Now Section 13 (4) Was Intended to Give Administrative Force to the Act With the Meaning Which It Had Already Acquired.

When the bill proposing the adding of subsections 3 and 4 to Section 13 of the Act was reported to Congress, the chairman of the Committee on Interstate Commerce said, among other things:

> "The Supreme Court held that Congress had not conferred upon the Interstate Commerce Commission the right to prescribe a rate in the stead of one which had been condemned; but so far as the condemnation of the rates is concerned, the power of the Interstate Commerce Commission is already ample, and it has succeeded in one way or another, in removing the discriminations which have come under its notice without the statute which we now propose."
>
> (See note at bottom of 281 U. S. 428.)

That report refers to the *Shreveport* case (234 U. S. 342).

That report shows that Congress intended to put the power of the Commission in dealing with intrastate rates which unjustly discriminate against interstate commerce, on full parity with its power in dealing with discrimination worked by interstate rates.

Statutory Power of the Commission.

By § 13 (1) of the Act any person is authorized to complain to the Commission against any common carrier subject to the Act because of a violation by the carrier of any provision of the Act. If the carrier does not satisfy the complaint within the time allowed it is made the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

That provision has been in the Act substantially as now from its original enactment. That is also true of subsection 2 of Section 13. Subsections 3 and 4 of Section 13 were added in 1920—thirteen years after the *Abilene Cotton Oil* case and many years after a number of the decisions which follow the *Abilene Cotton Oil* case.

Section 16 of the Act provides in substance that if, after hearing on a complaint made under section 13 of the Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named.

That provision was in the Act long before the adoption of the Transportation Act of 1920.

Paragraph (g) of subsection 3 of Section 16 provides that:

> "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

Thus we see that Section 13 (4) came into the Act as an amendment to original Section 13 for the purpose of giving the Commission greater power to enforce the provisions of the Act against unjust discrimination against interstate

commerce, whether that be caused by State or interstate rates.

We also see that the power to enforce the new provisions of § 13 continued to be the same as had been used to enforce the provisions of that section prior to the enactment of the amendment which added subsections 3 and 4 to Section 13.

We see that the word "overcharges" as defined in Section 16 prior to the adoption of the Transportation Act of 1920 exactly describe the claims sued on in the case at bar. (In the original Act the "overcharges" referred to those arising in violation of the Act as it then stood; this word now applies to those arising under the Act as changed in 1920.)

Under the provisions of Section 13 of the Act as it stood prior to the Transportation Act of 1920, one who complained of anything done or omitted to be done subject to the provisions of the Act, in contravention of the provisions thereof, might apply to the Commission setting out his complaint and if the complaint was not satisfied by the carrier within the time allowed, an investigation was made by the Commission. Then Section 16 came into operation and the Commission was directed "to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." If the carrier did not comply with that order then the person complaining might file suit in the circuit court (now District Court of the United States).

Under this plan no suit could be brought until the complaint, investigation, order of the Commission requiring payment and refusal of the carrier to comply with the order.

This system applied to claims for overcharges and for reparations in general.

Subsections 3 and 4 of Section 13 then came into the Act to promote the enforcement of the Act, to give additional power to the Commission in order that it might the

better enforce its orders and rules against discrimination.

The normal construction of the Act as applied to the claims for overcharges arising under subsections 3 and 4 of Section 13 was that these subsections came into the original Section 13 with the construction which had been previously put upon that section.

If the means of enforcing violations of the Interstate Commerce Act in the circumstances involved in this case, is not to be found through primary application to the Interstate Commission, it is not to be found at all except in the courts—State or Federal, according as one or the other's jurisdiction may appear to afford the complainant the better remedy. This, as has been pointed out in many decisions, will result in utter disregard of the uniformity required by the Act.

The Committees which reported the Transportation Act of 1920 clearly understood that they were simply perfecting a mechanism for enforcing the power already existing under Section 3 of the Act and this Court appears to have taken the same view in *Board* v. *Great Northern Rwy.*, 281 U. S. 413, especially at pages 426-428.

The complaint filed with the Commission in this case against the Atlantic Coast Line Railroad Company was based upon allegations that the Railroad Company had made intrastate rates for the transportation of logs which violated the Interstate Commerce Act in that those rates unjustly discriminated against interstate commerce which, of course, is made unlawful by Sections 3 and 13 (4) of the Act.

If it should be ruled that suit can be brought on such claims without first applying to the Interstate Commerce Commission it would result in destroying the superior jurisdiction which the *Shreveport* case (234 U. S. 342) ascribed to the Interstate Commerce Commission. The decision in the *Shreveport* case met with approval of public sentiment

to such an extent that subsections 3 and 4 of Section 13 were added so as to certainly give to the Commission the means by which it might complete the exercise of the power which it already had in due regard to the requirements of uniformity hereinbefore referred to.

The Decision of the Court in This Cause Makes a Perfect Illustration of Need for Applying the Doctrine of Primary Jurisdiction Here Contended For.

In the opinion of the District Court on the exceptions to the second report of the Master and on which the decree here appealed from was rendered, the court says:

> *"Discrimination as respects the revenues of the carrier, while a most important question in fixing permanent future rates, can hardly be investigated or considered in a private litigation between carrier and shipper regarding a past shipment."* (Italics added; R., Vol. 1, 349 at 353.)

That is practically a statement that discrimination as respects the revenue of this appellant was not considered in this case; that the court was unable to consider it and yet the whole basis of discrimination was upon the claim that the State scale of rates (Cummer scale) for the transportation of logs over the lines of this appellant, did not provide its fair proportionate share of the expenses of maintaining the carrier.

The Time When the Cummer Scale of Rates Became Involuntary.

The District Court, in its opinion on the exceptions to the Master's first report, which opinion is dated January 30, 1933, says:

> "The Railroad Company was neutral in the contest before the Interstate Commerce Commission but its

contract obligations having ceased early in 1929 it began on Feb. 5th to oppose the Florida Commission's efforts to enforce the Cummer scale in the Florida courts as above stated, and on March 7th, 1929, intervened in this court as an active litigant. The scale has not been voluntarily maintained since Feb. 7, 1929." (R., Vol. 1, pages 149-150.)

This statement by the court is in principle upheld by this Court in *United States* v. *New York Central*, 279 U. S. 73, at 78-79, where the Court said:

"We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. * * * But the filing of an application expresses a present dissatisfaction and a demand for more. A further protest would be a superfluous formality."

The District Court in its said opinion of January 30, 1933, at pages 169-170 of the record, also stated in this connection as follows:

"And this brings us to a reason independent of the statutes of Florida for considering the Cummer Scale an improper measure of restitution in that it is confiscatory and void. The Florida Commission in 1914 thought it too low to be compensatory. The Interstate Commerce Commission has twice so held it to be. This court in this litigation has thus expressed itself. Our master in considering the evidence produced on this exact issue has so concluded. We agree with him. The rate has never been enforceable since the Atlantic Coast Line Company repudiated it. But for the erroneous action of this court, the Railroad Company might have attacked it for this cause in February, 1929, by the usual proceedings in the case then pending in the State court, or in that also pending in the Federal court in Florida. The erroneous judgment of this court was no doubt the reason why it was not done.

> The point is that there can be no certainty that the shippers really lost everything paid above the Cummer Scale by the judgments of this court because the Cummer Scale was invalid and the carrier had the right to refuse, and in all likelihood would have refused, to do business under it if this court had set aside the Interstate Commerce Commission rate which superseded it."

It is respectfully submitted that it should be determined that the primary jurisdiction in this cause was with the Interstate Commerce Commission.

Respectfully submitted,

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January 21, 1935.